RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED

10-320 SEP 1 - 2010

No. _____ OFFICE OF THE CLERK

In The
Supreme Court of the United States

ANWAR HAQUE,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

**On Petition for Writ of Certiorari
To The New York State Supreme Court,
Appellate Division, Second Department**

PETITION FOR WRIT OF CERTIORARI

JONATHAN I. EDELSTEIN
Counsel of Record
271 Madison Avenue, 20th Floor
New York, NY 10016
(212) 871-0571 x208
jonathan9@earthlink.net

Library of Congress
Law Library

STATEMENT OF QUESTIONS PRESENTED

1. Under Padilla v. Kentucky, 130 S. Ct. 1473 (2010), is it ineffective assistance for an attorney to wrongly inform his client that he *will* face mandatory deportation if he accepts an offered plea, and may prejudice be established by the disparity between the offered plea and the sentence received after trial?

PARTIES TO THE PROCEEDING

The parties to the instant case are the People of the State of New York and petitioner Anwar Haque.

TABLE OF CONTENTS

Statement of Questions Presented i

List of Parties to the Proceeding ii

Table of Contents iii

Table of Authorities v

List of Reported Opinions 1

Jurisdictional Statement 2

Constitutional Provisions and Statutes at Issue 3

Statement of Facts 4

Argument 9

POINT I

PETITIONER RECEIVED INEFFECTIVE ASSISTANCE UNDER PADILLA v. KENTUCKY WHERE HIS ATTORNEY WRONGLY INFORMED HIM THAT HE WOULD FACE MANDATORY DEPORTATION IF HE ACCEPTED AN OFFERED PLEA, AND HIS SENTENCE AFTER TRIAL WAS 20 TIMES THE PENALTY OFFERED 9

Conclusion 21

Appendix A1

Decision of the Appellate Division, Second Department, Dated February 16, 2010 ..... A1

Order of the New York Court of Appeals Dated June 9, 2010 ..... A6

TABLE OF AUTHORITIES

Cases:

Alberto-Gonzalez v. INS,
215 F.3d 906 (9th Cir. 2000) 16

Fong Haw Tan v. Phelan,
333 U.S. 6, 10 (1948) 11,12

Henry v. Poole,
409 F.3d 48 (2d Cir. 2005) 21

McMann v. Richardson,
397 U.S. 759 (1970) 13

Padilla v. Kentucky,
130 S. Ct. 1473 (2010) ..... *passim*

People v. Fogle,
307 A.D.2d 299 (N.Y. App. Div. 2003) 23n

People v. Haque,
70 A.D.3d 967 (N.Y. App. Div. 2010) 1

People v. McDonald,
1 N.Y.3d 109 (2003) 20n

Pham v. United States,
317 F.3d 178 (2d Cir. 2003) 19

Rosario v. Ercole,
___ F.3d ___,
2010 U.S. App. LEXIS 16675
(2d Cir. 2010) 22,23

Rosario v. Ercole,
601 F.3d 118 (2d Cir. 2010) 21,22

Strickland v. Washington,
466 U.S. 668 (1984) 13,15,18,19,
..... 20,21,22,23

United States v. Campbell,
778 F.2d 764 (11th Cir. 1985) 20

United States v. Couto,
311 F.3d 179 (2d Cir. 2002) 20n

United States v. Gordon,
156 F.2d 376 (2d Cir. 1998) 19

United States v. Graham,
169 F.3d 787 (3d Cir. 1999) 16

United States v. Guzman-Bera,
216 F.3d 1019 (11th Cir. 2000) 16

United States v. Pacheco,
225 F.3d 148 (2d Cir. 2000) 17

Statutes and Regulations:

U.S. Const. Amend. 6 3

8 U.S.C. § 1101 15,16

8 U.S.C. § 1227 ..... 16n

8 U.S.C. § 1229b 16

28 U.S.C. § 1257 2

N.Y. Penal Law § 105.10 4

N.Y. Penal Law § 155.35 4

N.Y. Penal Law § 155.40 4

N.Y. Penal Law § 175.10 4

N.Y. Penal Law § 190.65 4

N.Y. Penal Law § 470.20 4

U.S. Sup. Ct. Rule 10 10

U.S. Sup. Ct. Rule 13 2

REPORTED OPINIONS

People v. Anwar Haque, 70 A.D.3d 967, 897 N.Y.S.2d 130 (N.Y. App. Div. 2010)

The order of the New York Court of Appeals denying discretionary review, dated June 9, 2010, is unreported.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) because this is a petition for *certiorari* from a final judgment of the New York Appellate Division, Second Department, in a criminal case. The Appellate Division is "the highest court of [the] State in which a decision could be had" because petitioner sought, but was denied, leave to appeal to the New York Court of Appeals.

This petition is timely because petitioner's application for discretionary review by the New York Court of Appeals was denied on June 9, 2010. See Supreme Court Rules, § 13(1). There have been no orders extending the time to petition for *certiorari*.

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

U.S. Const. Amend. 6:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF FACTS

The genesis of this case was "Operation Stars and Swipes," an investigation of credit card theft in the County of Queens, State of New York. Petitioner, a merchant in Jackson Heights, Queens, was implicated in the scheme. It was alleged that petitioner and other merchants would collude in "bust-out" credit card transactions. These consisted of sham transactions in which the merchants would process fake sales up to the credit limit on each card and split the proceeds with the card holder. It was alleged that the total amount obtained through this scheme was in excess of $6 million.

In 2002, petitioner was indicted by a Queens County grand jury on charges of money laundering in the first degree (N.Y. Penal Law § 470.20); grand larceny in the second degree (N.Y. Penal Law § 155.40, five counts); grand larceny in the third degree (N.Y. Penal Law § 155.35); falsifying business records in the first degree (N.Y. Penal Law § 175.10, four counts); conspiracy in the fourth degree (N.Y. Penal Law § 105.10) and scheme to defraud in the first degree (N.Y. Penal Law § 190.65, two counts).

Trial commenced in the Supreme Court, Queens County, before the Hon. Roberta J. Dunlop,

on January 5, 2004. Petitioner was tried jointly with co-defendant Abed "Jim" Shrayef.

On March 2, 2004, Shrayef's counsel, Michael Schwed, Esq., was suddenly rushed to the hospital for heart surgery. A mistrial was a distinct possibility. Finding this prospect unpalatable after two months of trial, the prosecutor offered petitioner a plea under which he would spend six months in jail followed by five years' probation. Petitioner, who is a Bangladeshi national without American citizenship, declined this offer out of fear that the plea would subject him to deportation.

At a later point in trial, Shrayef entered a guilty plea under which he agreed to serve three months in jail. The trial judge, outside the presence of the jury, mentioned the plea and advised petitioner that he might face consecutive sentences if convicted at trial. (T.5242-43). She suggested that petitioner "think as to whether he wishes to proceed or if he would like to see if there is an offer available." (T.5243).

Petitioner's counsel responded:

> Mr. Haque is concerned about the fallout from the immigration. That is

> something we have to investigate a little further. *I investigated a little further.* We are going to need at least a day to do that.

(T.5243) (emphasis added).

The trial proceeded to verdict and the jury convicted petitioner of all counts except one count of falsifying business records.

Petitioner appeared for sentencing on July 21, 2004. Prior to imposition of sentence, he was given an opportunity to address the Court. He stated, *inter alia*, as follows:

> I should have pled guilty before this trial ever began. It was – it was the fear of shame and the possibility of deportation to my former country where I may face [the] potential of being tortured and even summarily executed by entitled [sic] loyalties to the former government and incumbent Bangladesh National Party BNP, party of Bangladesh.
>
> My refusal to accept six months jail and

> five years probation... was not out of arrogance or ingratitude. I am not a citizen, your Honor, and this conviction will cause me to be deported. I love this country. It is my home. I take great pride in the fact that my five youngest children are citizens of this country.
>
> Were I to be deported, I would face leaving my children or taking them away from this great country. This is a choice I could not face.

(S.53-54).

The trial court then proceeded to sentence petitioner to an aggregate prison term of 21⅓ to 64 years. It should be noted that the others arrested with petitioner received sentences ranging from no jail time to 1⅓ to 4 years.

Petitioner appealed his conviction to the Appellate Division, Second Department. His retained counsel filed a brief arguing nine points. Petitioner, by permission of the court, filed a supplemental *pro se* brief. In this brief, he argued *inter alia* that his trial counsel was ineffective for falsely informing him that the plea offer would make

him subject to mandatory deportation, when in fact it would not have done so. Petitioner invoked both the Federal and State standards of ineffective assistance.

On February 16, 2010, the Second Department affirmed petitioner's conviction and sentence, albeit noting that by operation of law, his aggregate sentence was reduced to 10 to 21 years. (A1-5). The court disposed of the ineffective assistance claim in a single, one-sentence paragraph:

> The defendant's trial counsel provided meaningful representation and, thus, the defendant was not deprived of the effective assistance of counsel (see People v Benevento, 91 NY2d 708, 712, 697 N.E.2d 584, 674 N.Y.S.2d 629).

(A4).

Petitioner then sought leave to appeal to the New York Court of Appeals, the highest court in New York State. In addition to his counseled leave application, petitioner submitted a supplemental *pro se* application which included the issue of being incorrectly informed about the immigration consequences of his plea.

When this Court decided Padilla v. Kentucky, 130 S. Ct. 1473 (2010), petitioner submitted a further letter to the Court of Appeals advising it of the Padilla decision and urging it to review his ineffective assistance claim.

On June 9, 2010, the Hon. Susan Phillips Read of the New York Court of Appeals denied leave to appeal. (A6-7). This petition followed.

ARGUMENT

POINT I

PETITIONER RECEIVED INEFFECTIVE ASSISTANCE UNDER PADILLA v. KENTUCKY WHERE HIS ATTORNEY WRONGLY INFORMED HIM THAT HE WOULD FACE MANDATORY DEPORTATION IF HE ACCEPTED AN OFFERED PLEA, AND HIS SENTENCE AFTER TRIAL WAS 20 TIMES THE PENALTY OFFERED

This case presents a straightforward and compelling claim of ineffective assistance which falls squarely within this Court's Padilla precedent. Although this claim was disregarded by the State courts – quite possibly because it was included in

petitioner's *pro se* supplemental brief rather than in his counseled brief – the record is abundantly clear: petitioner was offered a highly advantageous plea that would not have subjected him to mandatory deportation, and he declined solely because he believed it would. Moreover, the record is clear that petitioner's trial counsel "investigated" the immigration consequences of the plea and that, either through misleading advice or at minimum failure to give correct advice, he failed to make defendant aware of the true situation.

This is, therefore, a case in which "a state court... has decided an important federal question in a way that conflicts with relevant decisions of this Court." See Supreme Court Rule 10(c). For the reasons detailed below, this Court should grant *certiorari* to review petitioner's Padilla claim or, alternatively, vacate the Appellate Division's decision and remand with instructions to reconsider in light of Padilla.

The Padilla Holding

Padilla emanated from a Kentucky state case in which a Honduran national pled guilty to marijuana trafficking. See Padilla, 130 S. Ct. at 1477. This offense subjected him to mandatory

deportation under current Federal law. Id. Before this Court, Padilla "claim[ed] that his counsel not only failed to advise him of this consequence prior to his entering the plea, but also told him that he did not have to worry about immigration status since he had been in the country so long." Id. at 1478. Reversing the decision of the Kentucky Supreme Court, which denied Padilla's claim, this Court held "that constitutionally competent counsel would have advised [Padilla] that his conviction for drug distribution made him subject to automatic deportation." Id. at 1478.

This Court began its analysis by noting the sweeping changes which have occurred in American immigration law:

> The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The

> "drastic measure" of deportation or removal, Fong Haw Tan v. Phelan, 333 U.S. 6, 10, 68 S. Ct. 374, 92 L. Ed. 433 (1948), is now virtually inevitable for a vast number of noncitizens convicted of crimes.

Id. This Court engaged in an extensive discussion of both the steadily increasing number of crimes that rendered aliens deportable and the steadily decreasing amount of judicial discretion to grant relief from deportation. See id. at 1478-80. As a result:

> These changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part -- indeed, sometimes the most important part -- of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

Id. at 1480 (emphasis added).

This Court then reiterated the principle that "[b]efore deciding whether to plead guilty, a defendant is entitled to "the effective assistance of competent counsel." Id. at 1480-81, citing McMann v. Richardson, 397 U.S. 759, 771 (1970); Strickland v. Washington, 466 U.S. 668, 686 (1984). Moreover, this Court emphasized that it has "never applied a distinction between direct and collateral consequences to define the scope of constitutionally reasonable professional assistance." Id. at 1481. Indeed, even if this Court were to apply such a distinction, the "unique nature of deportation," which is a "penalty" that is "intimately related to the criminal process," must place it within the "ambit of the Sixth Amendment right to counsel." Id. at 1481-82.

Turning to the Strickland standard for ineffective assistance, which requires as its first step a departure from an objective standard of reasonableness, see Strickland, 466 U.S. at 687-88, this Court held that "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation." Padilla, 130 S. Ct. at 1482. "We too have previously recognized that preserving the

client's right to remain in the United States may be more important to the client than any potential jail sentence." Id. at 1483. Thus, where "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for [a] conviction," id., it is ineffective assistance not to advise the defendant of same:

> Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses. Instead, Padilla's counsel provided him false assurance that his conviction would not result in his removal from this country. This is not a hard case in which to find deficiency: The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect...

> When the law is not succinct and straightforward, a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. ***But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.***

Id. (emphasis added).

This Court accordingly held that "counsel must inform her client whether his plea carries a risk of deportation." Id. at 1486. Notably, counsel is not merely obliged to refrain from giving incorrect advice; instead, he or she has an affirmative obligation to give correct advice.

In conclusion, this Court found that Padilla had satisfied the ineffectiveness prong of Strickland, and remanded for determination of whether he could satisfy the prejudice prong. See id. at 1486-87.

Petitioner Received Ineffective Assistance Under Padilla

This is a case where, in this Court's words,

"the deportation consequence [of the offered plea] was truly clear." Pursuant to 8 U.S.C. § 1101(a)(43)(E)(iii), a theft offense is only an "aggravated felony" for immigration purposes if "the term of imprisonment [is] at least one year." The one year threshold refers to the actual term of imprisonment imposed, not the maximum term available under the statute of conviction. See United States v. Pacheco, 225 F.3d 148, 154 (2d Cir. 2000); United States v. Guzman-Bera, 216 F.3d 1019, 1020 (11th Cir. 2000); Alberto-Gonzalez v. INS, 215 F.3d 906, 909-910 (9th Cir. 2000); United States v. Graham, 169 F.3d 787, 790 (3d Cir. 1999). Thus, the plea offered to petitioner Haque – a theft offense carrying a penalty of six months' jail and five years' probation – would not have been an aggravated felony, and would have left petitioner eligible for cancellation of removal pursuant to 8 U.S.C. § 1229b(a).[1] With the law "truly clear" in this fashion

---

[1] To be sure, petitioner would be "deportable" under 8 U.S.C. § 1227(a)(2)(A)(i)(II) on the ground that the plea on offer related to an offense "for which a sentence of one year or longer may be imposed." However, he would not have been subject to *mandatory* deportation, and in practice, removal proceedings are frequently cancelled or never initiated for persons in this position.

– and all it would have taken for counsel to ascertain the truth would have been to read two statutes and conduct elementary case law research – petitioner's counsel was obliged to give him accurate advice concerning the immigration consequences of the plea.

This was obviously not done. The record makes it painfully clear that petitioner believed that the plea would make him subject to mandatory deportation and separation from his five American-born children. The only way he could have still been under this impression at sentencing was that, despite the "investigation" that counsel said he had done and would do, counsel never advised him of the true consequences.

Petitioner's claim is somewhat different from the majority of Padilla claims. Most such arguments are made by defendants who pled guilty to offenses carrying mandatory deportation, and who later assert that they would have gone to trial had they but known. The logic of Padilla is equally compelling, however, when applied to a defendant who *refused* a guilty plea based on the erroneous belief that he *would* be deported, and is subsequently convicted at trial.

Indeed, the logic may be even more compelling

in such a case. As this Court stated, "the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does." Padilla, 130 S. Ct. at 1486-87. Petitioner Haque, due to his counsel's incorrect advice – or, at minimum, failure to give correct advice – was unable to exercise this choice intelligently. Since he was deprived of one of the very options that this Court believed should be available to criminal defendants, such deprivation should support an ineffective assistance claim.

Moreover, the prejudice prong of Strickland is arguably easier to satisfy in cases like this one than in the common run of Padilla-type claims. Where a defendant who pled guilty claims that he would have gone to trial if he knew that he would be deported, a reviewing court must engage in inherently speculative analysis of whether he would likely have been convicted and what the probable penalty would have been upon conviction. Often, the likely consequence of trial will cut against any inference of prejudice arising from the deportation consequences of the plea.

In contrast, where a defendant *refuses* a plea offer based on an erroneous belief as to its

immigration consequences, the penalty incurred after trial reinforces rather than undermines the inference of prejudice. Not only does such a defendant now face certain deportation – a consequence he would have avoided had he pled – but he *also* faces a substantially longer prison term. If the disparity between the plea offer and the sentence after trial is sufficiently great – and in the instant case, petitioner's *minimum* sentence is 20 times as great as what he would have faced had he accepted the plea offer – this may in itself be sufficient to show Strickland prejudice. See United States v. Gordon, 156 F.2d 376, 381 (2d Cir. 1998); accord Pham v. United States, 317 F.3d 178, 182 (2d Cir. 2003) ("a significant sentencing disparity in combination with defendant's statement of his intention is sufficient to support a prejudice finding").

This Court should therefore find that petitioner has satisfied both prongs of Strickland as interpreted by Padilla, in that (a) he was offered a highly advantageous plea that would not have subjected him to mandatory deportation; (b) his counsel incorrectly informed him about the immigration consequences of the plea offer, or at minimum failed to correctly inform him of those consequences; (c) he refused the plea offer because of

his erroneous belief that he would be deported; and (d) he was prejudiced in that he is now an aggravated felon and must serve a minimum of 10 years in prison rather than six months.

The Appellate Division Erroneously Rejected Petitioner's Ineffective Assistance Claim

It is readily apparent from the above – indeed, overwhelmingly apparent – that the Appellate Division erred in rejecting petitioner's ineffective assistance claim.[2] Indeed, the Appellate Division did not even apply the two-prong Strickland test. Instead, it relied exclusively on the New York "meaningful representation" standard under which an attorney's prejudicial error might conceivably be excused if his overall performance was competent.

---

[2] It should be noted that even before Padilla, both the Second Circuit and the New York Court of Appeals recognized that erroneous advice concerning the immigration consequences of a plea might constitute ineffective assistance. See United States v. Couto, 311 F.3d 179, 188 (2d Cir. 2002); People v. McDonald, 1 N.Y.3d 109, 114 (2003); accord United States v. Campbell, 778 F.2d 764, 768-69 (11th Cir. 1985).

In a series of recent decisions, the Second Circuit has strongly criticized this aspect of the New York standard and held that, if applied to excuse an attorney's prejudicial mistake, it is contrary to Strickland. In Henry v. Poole, 409 F.3d 48, 72 (2d Cir. 2005), the court held that "counsel's competency in all other respects" did not excuse his prejudicial errors. Indeed, the Second Circuit held that, to the extent that the New York State court relied upon counsel's overall competency to find effective assistance, it "failed to apply the Strickland standard at all." Id.

In Rosario v. Ercole, 601 F.3d 118 (2d Cir. 2010), the Second Circuit further explored the interplay between the New York State ineffective assistance standard and Strickland. The majority opinion included, *inter alia*, the following:

> [The New York] approach... creates a danger that some courts might misunderstand the New York standard and look past a prejudicial error as long as counsel conducted himself in a way that bespoke of general competency throughout the trial. *That would produce an absurd result inconsistent with... the mandates of Strickland.*

Id. at 126 (emphasis added).

The petitioner in Rosario subsequently applied for *en banc* review which, on August 10, 2010, the Second Circuit denied. See Rosario v. Ercole, ___ F.3d ___, 2010 U.S. App. LEXIS 16675 (2d Cir. 2010). Notably, *all* the judges who opined as to this denial, both those who concurred and those who dissented, agreed that, under Strickland, "the prejudicial effect of *each error* is evaluated with regard to outcome" and without regard to counsel's overall performance. See id., *5 (Wesley, J., concurring in denial of rehearing *en banc*) (emphasis added); see also id., *5 (Katzmann, J., concurring in denial of rehearing *en banc*) (error to "find a lawyer effective by focusing on the fairness of the process as a whole"); id., *9 (Jacobs, J., dissenting from denial of rehearing *en banc*) (Strickland does not "allow[] the gravity of individual errors to be discounted indulgently by a broader view of counsel's overall performance"); id., *13 (Pooler, J., dissenting from denial of rehearing *en banc*) ("den[ial of] relief despite an egregious error from counsel so long as counsel provides an overall meaningful representation... is contrary to Strickland").

Moreover, noting the divergence of the Federal

and New York standards, the judges strongly advised New York courts to analyze ineffective assistance claims separately under Federal and State law. Id., *4-5, 6, 13, 14.

In the instant case, petitioner unmistakably invoked Strickland and cited to that decision in his supplemental *pro se* brief. It was thus error for the Appellate Division to ignore petitioner's demonstration of prejudicial error and instead affirm his conviction based on the holistic "meaningful representation" standard. Given the clear variance between the Appellate Division's decision and the recent controlling precedent of this Court, the instant petition for *certiorari* should be granted and this Court should either review petitioner's claim or remand to the State court with instructions to reconsider in light of Padilla.[3]

---

[3] Assuming that any fact-finding is necessary to effectuate such reconsideration, the Appellate Division has the power to remand to the trial court for this purpose while retaining jurisdiction over the appeal. See People v. Fogle, 307 A.D.2d 299, 301-02 (N.Y. App. Div. 2003) (remitting to the trial court for factual findings relating to the defendant's ineffective assistance claim).

CONCLUSION

In light of the foregoing, this Court should grant *certiorari* on all issues raised in this Petition. Upon granting *certiorari*, this Court should review and vacate petitioner's conviction or, in the alternative, remand for reconsideration by the Appellate Division in light of Padilla.

Dated: New York, NY
August 31, 2010

JONATHAN I. EDELSTEIN

DECISION OF THE APPELLATE DIVISION, SECOND DEPARTMENT, DATED FEBRUARY 16, 2010

SUPREME COURT OF NEW YORK
APPELLATE DIVISION, SECOND DEPARTMENT

No. 2004-06406

PEOPLE OF THE STATE OF NEW YORK,

Appellee,

v.

ANWAR HAQUE,

Defendant - Appellant.

DECISION & ORDER

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Dunlop, J.), rendered July 21, 2004, convicting him of money laundering in the first degree, grand larceny in the second degree (five counts), grand larceny in the third degree, falsifying business records in the first

degree (three counts), conspiracy in the fourth degree, and scheme to defraud in the first degree (two counts), upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing, of that branch of the defendant's omnibus motion which was to suppress his statements to law enforcement officials.

ORDERED that the judgment is affirmed.

The Supreme Court properly denied that branch of the defendant's omnibus motion which was to suppress his statements made after arrest. The totality of the circumstances indicates that the statements were voluntarily made and not a product of coercion (see CPL 60.45; People v Farrell, 13 AD3d 644, 786 N.Y.S.2d 329). The defendant failed to preserve for appellate review his contention that the Supreme Court should have charged the jury with respect to the voluntariness of these post-arrest statements. In any event, since the defendant failed to elicit any evidence of coercion, the Supreme Court properly did not charge the jury with regard to the voluntariness of his statements to the police following his arrest (see CPL 60.45).

Since the defendant's money laundering continued and was completed after the effective date

of the 2000 amendment to Penal Law § 470.20 (L 2000, ch 489, § 5), his conviction of money laundering in the first degree did not violate the ex post facto clause of the United States Constitution (see US Const, art I, § 10 [1]; People v Shack, 86 NY2d 529, 540, 658 N.E.2d 706, 634 N.Y.S.2d 660; People v Blair, 45 AD3d 486, 847 N.Y.S.2d 32; People v Carrington, 178 AD2d 648, 577 N.Y.S.2d 885; People v Rosich, 170 AD2d 703, 567 N.Y.S.2d 749).

The testimony of the People's witness who summarized the voluminous records was properly admitted (see People v Potter, 255 AD2d 763, 682 N.Y.S.2d 238; People v Weinberg, 183 AD2d 932, 586 N.Y.S.2d 132). The bank investigators did not improperly testify to the ultimate issue before the jury (see People v A.S. Goldmen, Inc., 9 AD3d 283, 779 N.Y.S.2d 489). The Supreme Court did not remove an element of falsifying business records in the first degree from the consideration of the jury (cf. People v Martin, 36 AD3d 717, 826 N.Y.S.2d 747).

Viewing the evidence in the light most favorable to the prosecution (see People v Contes, 60 NY2d 620, 454 N.E.2d 932, 467 N.Y.S.2d 349), we find that it was legally sufficient to establish the defendant's guilt beyond a reasonable doubt, including his accessory liability for the aggregated

value of money stolen and laundered (see Penal Law § 20.00; People v Russell, 91 NY2d 280, 288, 693 N.E.2d 193, 670 N.Y.S.2d 166; People v Cabey, 85 NY2d 417, 649 N.E.2d 1164, 626 N.Y.S.2d 20; People v Allah, 71 NY2d 830, 832, 522 N.E.2d 1029, 527 N.Y.S.2d 731). Moreover, upon our independent review pursuant to CPL 470.15(5), we are satisfied that the verdict of guilt was not against the weight of the evidence (see People v Romero, 7 NY3d 633, 859 N.E.2d 902, 826 N.Y.S.2d 163).

The defendant's trial counsel provided meaningful representation and, thus, the defendant was not deprived of the effective assistance of counsel (see People v Benevento, 91 NY2d 708, 712, 697 N.E.2d 584, 674 N.Y.S.2d 629).

The sentence imposed was not excessive (see People v Suitte, 90 AD2d 80, 455 N.Y.S.2d 675). We note that, pursuant to Penal Law § 70.30(1)(e)(i), the aggregate maximum term of imprisonment for the consecutive grand larceny sentences must be deemed to be 20 years (see People v Moore, 61 NY2d 575, 463 N.E.2d 1206, 475 N.Y.S.2d 354; People v Johnson, 33 AD3d 939, 826 N.Y.S.2d 295; People v Rose, 297 AD2d 646, 746 N.Y.S.2d 908).

The defendant's remaining contentions,

including those raised in his supplemental pro se brief, are unpreserved for appellate review (see CPL 470.05[2]). In any event, they are without merit (see People v Ortiz, 92 NY2d 955, 705 N.E.2d 1199, 683 N.Y.S.2d 158 [properly sworn jury]; People v Cabey, 85 NY2d 417, 649 N.E.2d 1164, 626 N.Y.S.2d 20 [circumstantial evidence charge]; People v Calbud, Inc., 49 NY2d 389, 402 N.E.2d 1140, 426 N.Y.S.2d 238 [grand jury instructions]; People v Cox, 286 NY 137, 145, 36 N.E.2d 84; People v Tighe, 2 AD3d 1364, 768 N.Y.S.2d 871 [duplicitous counts]; People v Houghtaling, 14 AD3d 879, 882, 787 N.Y.S.2d 733 [larceny charge]; People v Cradle, 176 AD2d 212, 574 N.Y.S.2d 335 [accessory liability charge]), or do not require reversal (see People v Crimmins, 36 NY2d 230, 237, 326 N.E.2d 787, 367 N.Y.S.2d 213 [use of codefendant's statement; conspiracy charge]).

DILLON , J.P., FLORIO , LEVENTHAL and ROMAN , JJ., concur.

ORDER OF THE NEW YORK
COURT OF APPEALS
DATED JUNE 9, 2010

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. SUSAN PHILLIPS READ,
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

ANWAR HAQUE,

Appellant

CERTIFICATE DENYING LEAVE
Indictment No. 4136/02

I, SUSAN PHILLIPS READ, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission is hereby denied.

Dated: June 9, 2010
Albany, New York

/s/ Susan Phillips Read
Associate Judge

* Description of Order: Decision and Order of the Appellate Division, Second Department, entered February 16, 2010, affirming a judgment of the Supreme Court, Queens County, rendered July 21, 2004.

Supreme Court, U.S.
FILED
NOV 19 2010
OFFICE OF THE CLERK

No. 10-320

IN THE

Supreme Court of the United States

ANWAR HAQUE,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

On Petition For A Writ of Certiorari to the New York Supreme Court, Appellate Division, Second Department

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD A. BROWN
District Attorney
Queens County
Of Counsel
125-01 Queens Boulevard
Kew Gardens, New York 11415
718-286-5803

JOHN M. CASTELLANO*
EDWARD D. SASLAW
Assistant District Attorneys
Of Counsel

* *Counsel of Record for Respondent*

November 19, 2010

QUESTION PRESENTED

Is the record on direct appeal in this case sufficient to review petitioner's claim that counsel provided too harsh a warning about the deportation consequences of a plea offer where the record fails to reflect the advice given by counsel and where petitioner never availed himself of the collateral procedure provided by the state to supplement the record?

TABLE OF CONTENTS

Page No.

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 7

A. The Record Is Insufficient to Review the Question Presented by Petitioner 9

B. Petitioner Failed to Properly Present His Claim to the State Courts Because He Failed to Make an Adequate Record for Review Using the Procedure the State Provides for That Purpose 15

C. Even Assuming the Record Is Adequate for Review and That the Issue Had Been Properly Presented to the State Courts, the Petition Should Be Denied Because Petitioner Has Failed to Establish That Counsel Was Ineffective 19

D. The State Was Not Required to Order a Hearing on Petitioner's Claim, But Could Properly Relegate the Claim to Collateral Review 25

CONCLUSION 28

TABLE OF AUTHORITIES

Page No.

Cases

Adams v. Robertson, 520 U.S. 83 (1997) 16

Cardinale v. Louisiana, 394 U.S. 437 (1969) .. 8, 16

Howell v. Mississippi, 543 U.S. 440 (2005) 26

Illinois v. Gates, 462 U.S. 213 (1983) 16

Kentucky v. Stincer, 482 U.S. 730 (1987) 16

Lyons v. Goldstein, 290 N.Y. 19, 47 N.E.2d 425 (1943) 17

Massaro v. United States, 538 U.S. 500 (2003) ... 26

Padilla v. Kentucky, __ U.S.__, 130 S. Ct. 1473 (2010) 19-20

People v. Bachert, 69 N.Y.2d 593, 516 N.Y.S.2d 623, 509 N.E.2d 318 (1987) .. 17

People v. Brown, 45 N.Y.2d 852, 410 N.Y.S.2d 287, 382 N.E.2d 1149-50 (1978) 17

People v. Caban,5 N.Y. 3d 143 (2005) 25

People v. Haque, 15 N.Y.3d 750,
906 N.Y.S.2d 822, 933 N.E.2d 222 (2010) . . . 7

People v. Haque, 70 A.D.3d 967,
897 N.Y.S.2d 130 (2d Dept. 2010) 6

People v. Stultz, 2 N.Y.3d 277,
810 N.E.2d 883, 778 N.Y.S.2d 431
(2004) 24-25

People v. Turner, 5 N.Y.3d 476,
840 N.E.2d 123, 806 N.Y.S.2d 154
(2005) 24

Rosario v. Ercole, 601 F.3d 118 (2d Cir. 2010) 24

Tacon v. Arizona, 410 U.S. 351 (1973) 16

United States v. Griffin, 699 F.2d 1102
(11th Cir. 1983) 27

Statutes

8 U. S. C. § 1101 . . . . . 13n.2, 21n.5, 22

8 U.S.C. § 1229 21

N.Y. C.P.L. § 220.10 . . . . . 13n.2

N.Y. C.P.L. § 440.10 17

New York Penal Law § 105.10 . . . . . 2, 4

New York Penal Law § 155.35 . . . . . 2, 4

New York Penal Law § 155.40 ..... 2, 4

New York Penal Law § 175.10 ..... 2, 4

New York Penal Law § 190.65 ..... 2, 4

New York Penal Law § 470.20 ..... 2, 4

Other Authorities

Sup. Ct. Rule 10 14

E. Gressman, K. Geller, S. Shapiro, T. Bishop, and E. Hartnett, *Supreme Court Practice* ch. 6.37(I)(3) p. 505 (9th Ed. 2007) 14

No. 10-320

In the

SUPREME COURT OF THE UNITED STATES

October Term, 2010

ANWAR HAQUE,

Petitioner,

-against-

THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

From January, 1999, until search warrants were executed and he was arrested on July 23, 2002, petitioner and his confederates engaged in a complex scheme to defraud credit card companies. Petitioner and his accomplices engaged scores of credit card holders to submit phony charges disguised as

purchases at several small businesses in Jackson Heights so as to defraud credit card companies of massive sums of money.

For these acts, petitioner was charged with Money Laundering in the First Degree (New York Penal Law § 470.20 [1][b][ii]), Grand Larceny in the Second Degree (New York Penal Law § 155.40 [1][b]) [five counts]), Grand Larceny in the Third Degree (New York Penal Law § 155.35), Falsifying Business Records in the First Degree (New York Penal Law § 175.10) [ten counts]), Conspiracy in the Fourth Degree (New York Penal Law § 105.10 [1]), and Scheme to Defraud in the First Degree (New York Penal Law § 190.65) [two counts]).[1] Thereafter, he proceeded to trial before the Honorable Roberta Dunlop, a Justice of the New York State Supreme Court, and a jury.

The evidence at trial established that petitioner and his accomplices repeatedly submitted to merchant processor banks charges – often exceeding by large amounts the credit limits on a specific credit card – on multiple credit card accounts for fictitious purchases of

---

[1] Prior to petitioner's trial, co-defendants Kaium Shah and Barkat Ali pled guilty to Money Laundering in the First Degree. Shah was sentenced on November 22, 2005, to an indeterminate term of from one to three years in prison and Ali, on February 17, 2005, to a term of one and one-third to four years in prison. Co-defendant Sardar Uddin pled guilty to Grand Larceny in the Second Degree and was sentenced on June 15, 2004, to time served and a conditional discharge. Co-defendant Abed Jim Shrayef interrupted the joint trial with defendant to plead guilty on April 21, 2004, to Money Laundering in the Second Degree, and he was sentenced on March 25, 2005, to a split sentence with three month of jail time and five years of probation.

goods and services by numerous card holders. By petitioner's use of phony paperwork created to make the transactions appear to be bona fide, the credit companies were importuned to pay the charges to the business entities used by petitioner and his co-conspirators. The card holders and merchants split the proceeds of the fraudulent transactions as cardholders "busted out" their accounts, as the practice is commonly referred to in the credit card industry, by failing to make payments for the fictitious charges.

By this scheme, which is commonly referred to as "true name fraud," petitioner and his co-conspirators were able to steal well over $ 6.8 million, in amounts ranging from the more than $1.7 million defrauded from Chase and $1.5 million from American Express to slightly over $44,000 from Wells Fargo. In November, 2001, the scheme began to unravel when several of the credit card companies and banks conducted a review of credit card accounts that had been closed for non-payment and discovered a pattern of large monetary transactions among a group of Queens merchants.

Prior to and during trial, the prosecution offered petitioner opportunities to plead guilty and receive a reduced sentence. When questioned by the court about a potential disposition during trial, counsel stated that he needed to conduct a further investigation into the deportation consequences of the plea (T. 5242-43). The record made at that time does not reflect the crime to which defendant was asked to plead guilty or the proposed sentence. Petitioner eventually rejected all plea offers.

Petitioner was later convicted of one count of Money Laundering in the First Degree (New York Penal Law § 470.20 [1][b][ii]), five counts of Grand Larceny in the Second Degree (New York Penal Law § 155.40 [1]), one count of Grand Larceny in the Third Degree (New York Penal Law § 155.35), three counts of Falsifying Business Records in the First Degree (New York Penal Law § 175.10), and single counts of Conspiracy in the Fourth Degree (New York Penal Law § 105.10 [1]), and Scheme to Defraud in the First Degree (New York Penal Law § 190.65 [1][a]). He was sentenced to indeterminate prison terms totaling twenty-two years, six months, to sixty-four years, six months.

At sentencing, petitioner arranged for several people to speak on his behalf. A relative of petitioner explained that petitioner had not accepted any plea offer because, in part, of the "risk of deportation" (S. 43) Later, during petitioner's lengthy speech to the sentencing court, petitioner stated that he rejected a pretrial offer of six months in jail and five years of probation because of the "fear of shame and the possibility of deportation" (S. 53-54). He also stated at another point, "Were [he] to be deported," he would "face leaving [his] children or taking them away from this great country" (S. 53-54) At yet another point in the sentencing proceedings, petitioner stated, "I am not a citizen, Your Honor, and this conviction will cause me to be deported" (S. 53-54). The record does not indicate the offense to which defendant would have pled guilty, and does not otherwise reveal what counsel did or did not tell petitioner regarding the immigration consequences of his plea. Nor does the record

otherwise support petitioner's assertion that he was made an offer, at any time, with a proposed sentence of only six months' jail time and five years' probation.

On appeal to the Appellate Division of the New York Supreme Court, Second Judicial Department, petitioner, by a different attorney than had represented him at trial, raised numerous objections primarily to evidentiary rulings made during the course of and before the trial as well to some of the instructions to the jury. He also argued that the application of the money laundering statute to conduct that both preceded and continued after the Money Laundering statute was amended violated the ex post facto clause of the United States Constitution and a similar provision in the New York Constitution. Finally, petitioner's brief by counsel also argued that the evidence was legally insufficient, that the verdict was against the weight of the evidence, and that the sentence imposed on petitioner was excessive.

After prosecutors responded to the brief prepared by petitioner's attorney, petitioner requested and was granted permission to file, pro se, a supplemental brief. In that brief, too, petitioner argued that the evidence, at least as to the grand larceny counts, was insufficient and the convictions against the weight of the evidence.

In addition, petitioner's pro se brief raised a new claim, made for the first time, that his trial attorney was constitutionally ineffective. Among his many complaints about his representation, petitioner said that he was offered "[a] plea of six months jail and five

months probation," that "[t]he record shows that defense counsel was under the impression that acceptance of any plea would result in deportation [and that t]he record also shows that had it not been for the deportation consequences [petitioner] would have accepted the plea." (Pro Se Supplemental Brief to the Appellate Division at 63).

The Appellate Division affirmed the judgment of conviction on February 16, 2010. *People v. Haque*, 70 A.D.3d 967, 897 N.Y.S.2d 130 (2d Dept. 2010). As to petitioner's ineffectiveness claims, the Appellate Division said only that "trial counsel provided meaningful representation and, thus, [petitioner] was not deprived of the effective assistance of counsel." 70 A.D.3d at 968, 897 N.Y.S.2d at 131. The Appellate Division also noted that "the aggregate maximum term of imprisonment for the consecutive grand larceny sentences must be deemed to be 20 years," 70 A.D.3d at 969, 897 N.Y.S.2d at131, thus effectively reducing petitioner's sentence.

In an application for leave to appeal to the New York Court of Appeals, petitioner's state appellate counsel repeated most of the arguments that both counsel and petitioner pro se had presented including, without elaboration, a claim of "ineffective assistance under state and federal constitutions" (Letter of Gary Muldoon, dated March 2, 1010, at 6). Petitioner also filed an affidavit in support of the application, arguing, in part, that counsel provided ineffective assistance in rendering advice about the deportation consequences of the plea (Affidavit of Anwar Haque, dated March 17, 2010). A judge of the New York Court of Appeals, the

Hon. Susan Read, denied petitioner's leave application on June 19, 2010. People v. Haque, 15 N.Y.3d 750, 906 N.Y.S.2d 823, 933 N.E.2d 222 (2010).

Petitioner now seeks a writ of certiorari directed to the Appellate Division, New York's intermediate appellate court.

REASONS FOR DENYING THE WRIT

Petitioner contends that certiorari should be granted so that he may present what he calls "a straightforward and compelling claim of ineffective assistance" (Petition at 9). He claims that counsel warned him that he would necessarily be deported if he accepted an offer to plead guilty during trial, that that advice was inaccurate, and that he rejected the plea based on counsel's advice.

The record on this direct appeal, however, is insufficient to review these contentions. Nothing in the record establishes what advice counsel gave to petitioner, and thus it cannot be determined whether the advice given was accurate or not. Similarly, in the absence of evidence as to what advice counsel gave, it cannot be determined whether it was counsel's advice, rather than a family member's or an immigration attorney's advice, upon which petitioner ultimately relied. As a result, this case fails to present for review the issue petitioner now proffers. For this reason alone, certiorari should be denied.

Moreover, because petitioner did not place on the record sufficient facts to review the claim, he failed

to give the state courts an adequate opportunity to consider the contention. Before this Court will review a claim raised by a state criminal defendant, the issue must be first presented to the state courts. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). The state court record here, however, was insufficient to present the issue, and petitioner failed to avail himself of the procedure provided by the state courts for developing facts outside the record, namely a collateral motion for a new trial under section 440.10 of the New York Criminal Procedure Law. Absent such a record, the state courts did not have a sufficient basis to review the claim.

Petitioner in any event failed to establish a claim of ineffectiveness in the state courts. This is so, if for no other reason, because the record simply does not support the factual premise of his claim – that counsel told him he would necessarily be deported as a result of the plea. As a result, he could not prevail in this Court.

Nor was the state appellate court required to order a hearing on this issue, as petitioner now suggests. Both the state courts and this Court have recognized that collateral review presents the optimal procedural vehicle for ineffective counsel claims, and the state court committed no constitutional error by relegating petitioner to that procedure. Moreover, petitioner never requested the state court to hold a hearing on this issue, and thus any purported constitutional requirement to hold a hearing was not properly presented below.

In short, this case simply does not present petitioner's current contention for review, both because the record does not contain sufficient facts for consideration of the issue and because the issue, lacking adequate factual development, was not properly presented to the state courts. For both these reasons, and because petitioner could not prevail in this Court based on the record on direct appeal, certiorari should be denied.

A. The Record is Insufficient to Review the Question Presented by Petitioner

This case fails to present for review the issue that petitioner wishes this Court to decide. The issue petitioner asks this Court to review, in the "Question Presented" section of his petition, is whether it is "ineffective assistance for an attorney to wrongly inform his client that he *will* face mandatory deportation if he accepts an offered plea . . . ." He argues in the body of the petition that he was offered a plea to an offense that was not an aggravated felony, that he thus would have been eligible for cancellation of removal had he accepted the plea, and that counsel "obviously" did not provide that information to petitioner (Petition at 9-11).

Despite petitioner's claim that the record on direct appeal is "abundantly clear" on this point (Petition at 10), the record fails to disclose what advice was rendered by defense counsel. At best, it indicates that petitioner did not want to face the "possibility" of deportation attendant to the proposed plea. Whether counsel advised defendant that he would necessarily be

deported, whether he included any advice regarding the possibility or likelihood of cancellation of removal, or whether family or immigration counsel provided any advice upon which petitioner may have relied simply are issues that cannot be resolved on this record. Thus, this record does not present petitioner's claim for review.

In order to obtain review in this Court, petitioner claims that the record is "clear" in establishing that trial counsel gave "misleading advice," or, at minimum, failed to "give correct advice" Petition at 10. Similarly, in state court, petitioner maintained that "[t]he record shows that defense counsel was under the impression that acceptance of any plea would result in deportation" (*Pro Se* Supplemental Brief to the Appellate Division at 63). But neither is even remotely accurate. Far from showing what was trial counsel's "impression" or, indeed the advice he gave, the portion of the trial record to which petitioner makes reference quotes the attorney as saying that petitioner was "concerned about the fallout from immigration" should he plead guilty to an unstated lesser offense and that the attorney would need to investigate that question further (Petition at 5-6). Thus, however "painfully clear" it might have been that petitioner was concerned about the deportation consequences of a plea (Petition at 17), the record establishes nothing about what counsel told petitioner, much less that it was incorrect or misleading.

Likewise, the sole portion of the record to which petitioner makes reference to support his contention

about the eventual outcome of his attorney's immigration inquiries is his own unsupported and unsworn explanation to the sentencing judge, after the jury rendered its guilty verdict, as to why he did not accept an offer to permit him to plead guilty to a lesser offense "before this trial ever began." Petition at 6-7. In explaining to the sentencing judge why he did not accept some plea offer "before this trial ever began" (thus not apparently referring to the mid-trial offer that he now references), petitioner suggested that he could not do so because of "the fear of shame and the *possibility of deportation* to my former country..." (Petition at 6-7) (emphasis added). To characterize this statement to the trial judge about his fears of "the possibility of deportation" as being "abundantly clear" evidence that counsel told him that he would necessarily be deported and failed to inform him of the possibility of cancellation of removal is simply inaccurate.

Moreover, elsewhere in the sentencing proceedings, there were similar references to the rejection of the prior plea deal as being based on a possibility, rather than a certainty, of deportation as a result of the plea offer. A relative speaking on petitioner's behalf at sentencing referred to the rejection of the offer as being based on a "risk" of deportation (S. 43). Similarly, petitioner himself referred to what might have occurred "[w]ere [he] to be deported" as a result of the prior plea. These record references to the possibility of deportation indeed belie defendant's claim that counsel told him that deportation was guaranteed.

Petitioner's other statement at sentencing, after he had been convicted by a jury, that "this conviction will cause me to be deported" (S. 54), is similarly insufficient to establish what counsel said to petitioner about the prior plea offer. First, it is unclear whether petitioner was speaking about his conviction after trial or the plea he was previously offered. This is particularly true given the post-trial timing of the statement and the use of the present tense in making this statement. Second, even assuming the reference was to the potential conviction on a rejected plea offer, the statement was offset by the instances in which much more tentative phrasing was used in relation to the immigration consequences of the prior plea, including his reference to merely the "possibility of deportation" and his relative's reference to the "*risk* of deportation." Thus, the single phrase in petitioner's sentencing proceeding that his "conviction will cause" his deportation – inserted between other conditional references to potential immigration consequences – is far from "obvious" proof that his counsel told him that he necessarily would be deported if he accepted the prior plea and that counsel thereafter failed to explain the possibility of the cancellation of removal.

Moreover, even assuming that the record of the sentencing proceedings were sufficient to show that petitioner had been given inaccurate advice, it does not show who provided that advice. Indeed, at no point during the sentencing does petitioner or his relative state that counsel gave him the advice upon which he allegedly relied in making his decision. Whether family members, such as those who spoke at sentencing, provided advice upon which petitioner

chose to rely, or whether counsel's investigation included referral to an immigration attorney, as is often the case, simply cannot be determined on this record. For this reason too, the record is insufficient to review the claim that counsel provided inadequate advice.[2]

Still further, there is nothing in the record that even establishes that petitioner was ever offered a plea to six months' jail time and five years' probation, other than his own self-serving statement made during his lengthy and rambling sentencing speech. Indeed, neither defense counsel nor the prosecutors refer to a prior plea offer on these terms. And even petitioner's own statement at sentencing fails to indicate the offense or offenses to which he would have pleaded guilty. Thus, the record is not even sufficient to show that he was offered a plea to a crime that could have afforded him cancellation of removal.[3]

---

[2]The record does not even identify the specific charge to which petitioner would have pled guilty, something that, under New York law, was not his to decide alone and required the prosecutor's consent. *See* N.Y. C.P.L. § 220.10 (3). Since whether petitioner's contention, made here for the first time, that the unspecified theft offense he says he could have pled guilty to was not an "aggravated felony" under the terms of 8 U. S. C. §§ 1101(a)(43), 1229b (a), *see* Petition at 16, could turn on exactly what offense petitioner might have pled guilty to, as well as the sentence he would have received, the incomplete record presents yet another reason why this record provides an inadequate basis to review defendant's claim.

[3]As petitioner concedes, a theft offense for which a sentence of more than one year is imposed is an aggravated felony, which precludes an application for cancellation of removal (*see* Petition

For all these reasons, petitioner's current attempt to extrapolate backwards from the statements made at sentencing fails. Notwithstanding the fact that petitioner feared removal, the statements at sentencing simply failed to establish what counsel stated, whether or not it included any reference to the possibility of the cancellation of removal, whether petitioner received advice from any other source upon which he chose to rely, or even what the rejected plea deal was.

Indeed, the very most that could be said of the record in this case is that it raises a factual question over what advice was actually given by counsel. But this Court does not ordinarily grant certiorari to review factual issues. *See* Sup. Ct. Rule 10 ("A petition for certiorari is rarely granted when the asserted error consists of erroneous factual findings"); E. Gressman, K. Geller, S. Shapiro, T. Bishop, and E. Hartnett, *Supreme Court Practice* ch. 6.37(I)(3) p. 505 (9th Ed. 2007) ("the Supreme Court does not ordinarily grant review in such "fact bound" cases). Nor is this case an exceptional one warranting review even though the factual issue, rather than the legal one, predominates.

Finally, petitioner's case is particularly unworthy of review because he had, and *still has*, an opportunity to supplement the very limited record on direct appeal and obtain review of his claim in state court based upon a record adequate to the task. As

---

at 16). If the actual plea offered involved such a sentence, counsel would have been fully justified in warning petitioner about deportation in the strongest possible terms.

explained below, the state provides a post-conviction procedure in the trial court to determine factual issues such as those alleged here under section 440.10 of the New York Criminal Procedure Law. Petitioner, however, has never availed himself of this procedure, choosing instead to draw inferences from a record that fails to support them. Nor has petitioner ever alleged that his trial attorney has become unavailable to participate in such a proceeding or that petitioner would otherwise be unable to provide affidavits or evidence in such a forum. Given the availability of a state procedure to resolve the factual claim petitioner raises, petitioner should not be permitted to press his claim on a record that, at best, provides some circumstantial approximation of what counsel might have said, rather than on what he actually did say.

In short, even assuming petitioner were correct on the law, this case turns on questions of fact, ones that this record does not answer. Because the record in this case would provide at best only a very truncated circumstantial basis for review, and because another procedure exists under state law for development of the factual basis of the claim, certiorari should be denied.

B. Petitioner Failed to Properly Present His Claim to the State Courts Because He Failed to Make an Adequate Record for Review Using the Procedure the State Provides for that Purpose.

Petitioner failed to properly present his claim for review in the state courts. When he attempted to raise the issue in the Appellate Division, petitioner presented the state court with an inadequate record to

review the claim he now makes, even though he could have made a full record by availing himself of the state post-conviction procedure specifically designed for this purpose. Because he thus failed to provide the state courts with a full and fair opportunity to review the claim, this Court should deny certiorari.

This Court has regularly adhered to the rule that, in reviewing state court judgments, a petitioner's federal claim must be properly presented to, or "expressly decided" by, the state courts. *Adams v. Robertson*, 520 U.S. 83, 86 (1997); see *Kentucky v. Stincer*, 482 U.S. 730, 747 n. 22 (1987) (internal quotation marks and citations omitted); *see also Cardinale v. Louisiana*, 394 U.S. 437 (1969); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973). This is because, among other things, in a federal system, it is important for the state courts to consider the federal constitutional issue first before the federal judiciary steps in to correct any error. *Cardinale*, 394 U.S. at 438; *Illinois v. Gates*, 462 U.S. 213, 221 (1983).

Here, petitioner did not properly present his claim to the state court because he failed to develop the factual basis of his contention, choosing to raise the issue on direct appeal instead of using the procedure provided by the state for addressing matters outside the record. First, for the reasons stated above, the record in this case was inadequate to the task of reviewing counsel's advice. At best, there were ambiguous references to advice concerning immigration, without any attribution to the attorney. Thus, petitioner failed to provide the Appellate

Division with an adequate basis upon which to decide his claim.

Second, petitioner failed to avail himself of the procedure provided under state law to elaborate on factual contentions not made out by the record on direct appeal. New York has long provided a vehicle for presenting off-the-record claims in support of a motion to vacate a conviction, particularly one based on an assertion that a defendant's trial attorney provided constitutionally ineffective assistance. *Lyons v. Goldstein*, 290 N.Y. 19, 47 N.E.2d 425 (1943). *See People v. Bachert*, 69 N.Y.2d 593, 598, 516 N.Y.S.2d 623, 509 N.E.2d 318 (1987). As the New York Court of Appeals has long observed, the codification of this basis for relief from a conviction on facts outside the record of the original proceeding, Article 440 of the New York Criminal Procedure Law, makes it apparent that "in the typical case it would be better, and in cases such as this one essential, that an appellate attack on the effectiveness of counsel be bottomed on an evidentiary exploration by collateral or post-conviction proceeding brought under CPL 440.10." *People v. Brown*, 45 N.Y.2d 852, 853-854, 410 N.Y.S.2d 287, 382 N.E.2d 1149-50 (1978). Petitioner, however, failed to avail himself of this procedure, and, in so doing, deprived the state courts of a full "evidentiary exploration" of his claim.

Nor was the issue now raised by petitioner with regard to counsel's immigration advice "expressly decided" by the state courts. Indeed, nothing in the Appellate Division's decision, or the New York Court of Appeals' denial of leave, made any reference to the

immigration advice provided by counsel or to the requirements of state or federal law regarding immigration advice. Petitioner is thus hard pressed to claim in this Court that the state courts "expressly" addressed his claim.

Furthermore, while the Appellate Division did make a general statement concerning the effectiveness of counsel, this part of the opinion did not "expressly" address petitioner's claim, nor did it otherwise necessarily decide the claim. Petitioner in his *pro se* supplemental brief wrote twelve pages of complaints about counsel going far beyond immigration advice to such matters as the purported failure to seek suppression, the failure to make motions to dismiss during trial, the failure to request appropriate instructions, and the failure to object to various portions of the court's charge. More important, all of the other ineffectiveness claims raised by petitioner were reflected in the record, which was adequate for review of those claims. As a result, it is not at all clear that the Appellate Division's statement refers to petitioner's plea advice claim, rather than the many claims petitioner raised that were reviewable on the record presented to the court. Indeed, petitioner himself describes the claim as "disregarded" by the state courts (Petition at 9). Accordingly, petitioner cannot credibly maintain that the Appellate Division "expressly" decided the specific issue he now seeks to raise.

Because petitioner failed to make an adequate record on direct appeal upon which to base his claim and failed to make a proper motion so that an adequate

record could be made, he failed to properly present his claim in state court. And because petitioner's failure to properly present his claim below would raise a procedural impediment to review in this Court, the petition for certiorari should be denied.

C. Even Assuming the Record Is Adequate for Review and That the Issue Had Been Properly Presented to the State Courts, the Petition Should Be Denied Because Petitioner Has Failed to Establish That Counsel Was Ineffective.

Even assuming that petitioner's claim could be reviewed based on the sparse record provided, petitioner falls far short of establishing ineffectiveness. This is so for several reasons.

First, petitioner failed to make out the factual premise of his claim, for all of the reasons stated above. The record reveals, at most, that counsel warned petitioner that he could be deported, not that counsel told petitioner that he necessarily would be deported, as petitioner now contends.

Indeed, nothing in this record establishes that counsel over-warned petitioner. Even under petitioner's interpretation of the record, the plea offered in this case would have rendered him "deportable" under 8 U.S.C. § 1227 (Petition at 16), the same statute that rendered the defendant deportable in *Padilla v. Kentucky*, __ U.S.__, 130 S. Ct.

1473 (2010).[4] As such, counsel was required, as *Padilla* itself directs, to inform petitioner that he was subject to "presumptively mandatory," "automatic," or "practically inevitable" deportation. *Id.* at 1477, 1478, 1480. This alone would explain the quite justifiable concern petitioner expressed at the time of sentence that he was likely to have been deported as a result of a plea.

Moreover, nothing in this record establishes that counsel failed to inform petitioner about the *possibility* of cancellation of removal, even assuming that counsel was required to give that advice. The record affirmatively reflects in several places that petitioner was concerned with a "risk" or "possibility" of deportation, which is fully consistent with counsel having discussed the limited remedies available to avoid deportation. And because, as this Court noted in *Padilla*, cancellation of removal is nothing more than the "limited remnants of equitable discretion vested in the Attorney General," *id.* at 1480, counsel would have erred had he suggested anything more than that cancellation was a possibility.

---

[4] Both the provision that petitioner says would have applied to him, 8 U.S.C. § 1227(a)(2)(A)(i)(II) (*see* Petition at 16, n. 1), and the one that applied to Padilla, 8 U. S. C. §1227(a)(2)(B)(I), describe the consequences of such a conviction by the word "deportable." Interestingly, in his affidavit to the New York Court of Appeals in support of his application for leave to appeal, petitioner claimed that trial counsel told him that, if he accepted the plea, he "would be a deportable alien." *See* Affirmation of Anwar Haque, dated March 17, 2010 at par. 9. This advice would appear to be completely accurate.

Similarly, defendant's single ambiguous statement at sentencing that "this conviction will cause me to be deported" (S. 53-54) is readily attributable to petitioner's status after the jury's verdict, which rendered him guilty of an aggravated felony for which cancellation of removal was not available.[5] And even assuming that the statement referred to the prior plea offer, it could easily be explained as reflecting petitioner's understanding that deportation was "practically inevitable" despite the possibility of cancellation of removal. Indeed, it is likely that the limited, discretionary possibility of cancellation of removal after deportation proceedings were instituted would have provided cold comfort to petitioner. Thus, petitioner 's fully justified concern over deportation at the time of sentence simply fails to establish that counsel told petitioner that he would necessarily be deported as a result of a plea.

Nor has petitioner established that cancellation of removal was even available to petitioner, under the plea offers extended to him. Cancellation of removal is available to those who have been lawful permanent resident aliens for five years or more, who have resided continuously in this country for more than seven years, and who have not committed aggravated felonies. *See* 8 U.S.C. § 1229b(a). As petitioner concedes, a theft offense, such as those charged in this case, is an

---

[5]Petitioner was convicted of five counts of Grand Larceny in the Second Degree and sentenced to from four to twelve years on each count. Under 8 U.S.C. § 1101(a)(43)(G), a theft offense is an aggravated felony for immigration purposes if "the term of imprisonment [is] at least one year."

aggravated felony where the term of imprisonment is at least one year (Petition at 16). *See* 8 U.S.C. § 1101(a)(43)(G). Here, petitioner cites to no portion of the record establishing that he was a lawful permanent resident alien for five years prior to his crimes. Moreover, petitioner has failed to establish the actual terms of the plea offers made to him. Indeed, nothing in the record supports petitioner's self-serving statement in his lengthy, wandering sentencing speech that he was made an offer of six months' jail and five years' probation prior to trial. Indeed, neither defense counsel nor the prosecutors made any reference to such a lenient deal and the other two defendants who were allowed to plead guilty prior to trial were offered and received sentences of more than one year in jail.[6] If the offer here were similar to those offers, then cancellation of removal would not be available.

Second, notwithstanding his claim that this case falls "squarely within" *Padilla* (Petition at 9), nothing in *Padilla* requires that counsel minimize the prospect of deportation when it is presumptively mandatory. To the contrary, the logic and holding of *Padilla* is that counsel must inform a defendant about the harsh consequences of deportation. Where, as here, a defendant is subject to "presumptively mandatory," "automatic," or "practically inevitable" deportation, *Padilla* directs that counsel tell him so in no uncertain terms. That case does not compel counsel to raise his client's hopes that he will obtain a purely discretionary

---

[6]One co-defendant pled guilty to a lesser sentence during trial, but petitioner's reference at sentencing was clear to pre-trial plea offer (S. 53).

remedy that might or might not someday materialize. Indeed, to do so would seem to be contrary to the central point of *Padilla*, to ensure that the client is aware of the severe, "practically inevitable" consequences that attach to his conviction and that he is willing to accept that consequence.

Third, petitioner has failed to establish that, had he been informed about the possible remedy of cancellation of removal, he would have chosen to take the plea. Indeed, had counsel informed petitioner of the remedy, he would also have had to inform petitioner that he would nevertheless be subject to immediate deportation proceedings and that the remedy was wholly discretionary in nature. If petitioner took the plea, he would thus be placing the dispositive question regarding his ability to remain in this country in the hands of immigration authorities, undoubtedly a frightening prospect to a non-citizen. By contrast, the only option available to petitioner that could have resulted in escaping deportation proceedings entirely was a trial and acquittal. Petitioner could easily have preferred this option of avoiding deportation proceedings altogether over placing his fate wholly in the hands of immigration authorities.

Nor could petitioner prevail in this Court on his claim that he established prejudice solely because of the disparity between the sentence offered pursuant to a plea and the sentence actually imposed. Contrary to petitioner's suggestion, the issue is, at its core, a factual one, to be decided based on all the relevant facts and circumstances. The question, pursuant to

Strickland's prejudice prong, is whether petitioner would have accepted the plea had he been informed of the wholly discretionary possibility of cancellation of removal. This in turn would depend on considerations other than the absolute number of years that petitioner was offered pursuant to the plea and the sentence he eventually received. It includes petitioner's and counsel's reasonable assessment of the evidence at the time the plea offer was made and the credibility of petitioner's claim that he would have been willing to give up the possibility of avoiding deportation proceedings altogether, which he could only have achieved by going to trial and obtaining an acquittal. The issue, then, is necessarily dependent on more than the disparity in the offered and received sentences. And even assuming such a disparity could support a finding of prejudice, the state court was not compelled to accept that conclusion, particularly where, as here, no such finding was ever made.

Equally unavailing is petitioner's criticism of the state court for citing the state constitutional standard for ineffective counsel claims in its decision (Petition at 22-23). Initially, as petitioner acknowledges, his many claims of ineffectiveness were made, in part, based on the state constitution, and thus it is hardly surprising that the court chose to recite the state standard for such claims. Moreover, both the New York Court of Appeals and the Second Circuit have acknowledged that the state standard is more generous to defendants than the federal standard. *See* Rosario v. Ercole, 601 F.3d 118, 123-26 (2d Cir. 2010); *People v. Turner*, 5 N.Y.3d 476, 480, 840 N.E.2d 123, 806 N.Y.S.2d 154 (2005); *People v. Stultz*, 2 N.Y.3d 277, 284 n. 12, 810

N.E.2d 883, 778 N.Y.S.2d 431 (2004). This is so because under state law, a defendant need not satisfy *Strickland*'s stringent, outcome-determinative prejudice test in order to obtain relief. *See People v. Caban*, 5 N.Y. 3d 143 (2005). If the error is sufficiently egregious, a state defendant may obtain a reversal even in the absence of a reasonable probability of a different result. *Id.* Thus, contrary to petitioner's contention, nothing in the state court decision suggests that the state relied on a standard stricter than the one applicable under federal law.

In sum, petitioner could not prevail on his claim in this Court, even if it had been properly presented to the state courts and was properly before this Court. Petitioner has failed to establish on this record that counsel provided constitutionally inadequate advice, or that he would have traded the possibility of an acquittal and the avoidance of deportation proceedings entirely for the wholly discretionary remedy of cancellation of removal.

D. The State Was Not Required to Order a Hearing on Petitioner's Claim, But Could Properly Relegate the Claim to Collateral Review.

Petitioner's suggestion that the state should have ordered a hearing to resolve any factual questions presented by the record (Petition at 10, 23, n.3) is of not avail to him. Two reasons mandate this conclusion.

First, petitioner never argued below that the state courts were constitutionally compelled to order a hearing on this claim. Indeed, petitioner never requested a hearing at all regarding his claim, either as a matter of state or federal constitutional law, and never so much as admitted the possibility that the record was ambiguous as to his claim (*see Pro Se* Supplemental Brief at 63-64). Petitioner thus failed to present this contention to the court hearing his appeal, much less present the claim in federal constitutional terms, as required as a prerequisite to review in this Court. *See Howell v. Mississippi*, 543 U.S. 440, 443-44 (2005).

Second, petitioner has failed to show the existence of a constitutional entitlement to a hearing on direct appeal, particularly where the state provides an alternate remedy to obtain a hearing that petitioner has failed to use. In fact, as to complaints of ineffective counsel in particular, this Court has recognized that collateral post-judgment motions are not only permissible to resolve the factual and legal issues attendant to such claims, but are the preferred method for addressing these issues.

Referring to the federal analogue to New York's 440 motion, this Court concluded in *Massaro v. United States*, 538 U.S. 500, 504-05 (2003), that the trial court is "the forum best suited to developing the facts necessary to determining the adequacy of representation" at the trial level. *Id.* at 505. This Court explained, "When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed

precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose." *Id.* By contrast, in a post-judgment collateral motion in the trial court, the defendant "has a full opportunity to prove facts establishing ineffectiveness of counsel, the government has a full opportunity to present evidence to the contrary, the district court hears spoken words we can see only in print and sees expressions we will never see, and a factual record bearing precisely on the issue is created." *Id.* at 506 (quoting *United States v. Griffin*, 699 F.2d 1102, 1109 [11th Cir. 1983]). Thus, the "better-reasoned approach is to permit ineffective-assistance claims to be brought in the first instance in a timely motion" in the trial court, and "[t]his so even if the record contains some indication of deficiencies in counsel's performance." *Id.* at 504.

Thus, the procedure provided by the state court for resolving factual issues regarding ineffectiveness claims was not only permissible, but perfectly appropriate. Accordingly, petitioner cannot now complain that the state court violated his rights under the federal constitution by declining to order a hearing on direct appeal, particularly considering that none was requested.

CONCLUSION

Petitioner seeks review of an issue that is not presented by the record in this case, which wholly fails to provide an adequate basis for review of his claim. The record was similarly inadequate when presented to the Appellate Division, depriving that court of a full and fair opportunity to review his factual and legal contentions. Nor was the state court constitutionally compelled to order a hearing on direct appeal to supplement the record, as the state provides an alternative procedure for that purpose, one petitioner never sought to use. Finally, even if petitioner's claim were otherwise appropriate for review, it would necessarily fail, as petitioner cannot show on this record that counsel gave constitutionally deficient advice.

Respectfully submitted,

RICHARD A. BROWN
District Attorney, Queens County

JOHN M. CASTELLANO*
EDWARD D. SASLAW
Assistant District Attorneys
**Counsel of Record for the Respondent*

November 19, 2010

PRINTINGHOUSE PRESS, LTD
10 EAST 39TH STREET, NEW YORK, NY 10016 (212) 719-0990
Printed on Recycled Paper

No. 10-320

Supreme Court, U.S.
FILED
NOV 3 0 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ANWAR HAQUE,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari To The New York State Supreme Court, Appellate Division, Second Department

REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JONATHAN I. EDELSTEIN
Counsel of Record
271 Madison Avenue, 20th Floor
New York, NY 10016
(212) 871-0571 x208
jonathan9@earthlink.net

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Preliminary Statement 1

Argument 1

POINT I

THIS COURT SHOULD GRANT CERTIORARI AND REMAND TO THE APPELLATE DIVISION FOR RECONSIDERATION IN LIGHT OF PADILLA 1

Conclusion 12

TABLE OF AUTHORITIES

Cases:

Adams v. Robertson,
520 U.S. 83 (1997) 8

Massaro v. United States,
538 U.S. 500 (2003) 9n,10n

Padilla v. Kentucky,
130 S. Ct. 1473 (2010) ..... *passim*

People v. Borell,
12 N.Y.3d 365 (N.Y. 2009) 4

People v. Haque,
70 A.D.3d 967 (N.Y. App. Div. 2009) 8

People v. McClain,
250 A.D.2d 871 (N.Y. App. Div. 1998) 3

People v. Ozuna,
27 A.D.3d 339 (N.Y. App. Div. 2007) 10n

People v. Shih-Wei Su,
213 A.D.2d 502 (N.Y. App. Div. 1995) 9n

People v. Shih-Wei Su,
267 A.D.2d 260 (N.Y. App. Div. 1998) 9n

Rosario v. Ercole,
617 F.3d 683 (2d Cir. 2010) 3

Rosario v. Ercole,
601 F.3d 118 (2d Cir. 2010) 3

Strickland v. Washington,
466 U.S. 668 (1984) 2,3,4,7

Statutes and Regulations:

8 U.S.C. § 1227 5

N.Y. Crim. Proc. Law § 440.10 ..... 9n,10n,12

PRELIMINARY STATEMENT

Petitioner ANWAR HAQUE, by his counsel Jonathan I. Edelstein, respectfully submits this Reply Brief in response to the Brief in Opposition dated November 19, 2010 ("Opp. Brf.") and in further support of his petition for *certiorari* to the New York State Supreme Court, Appellate Division, Second Department.

ARGUMENT

POINT I

THIS COURT SHOULD GRANT CERTIORARI AND REMAND TO THE APPELLATE DIVISION FOR RECONSIDERATION IN LIGHT OF PADILLA

A. Vacatur and Remand is Appropriate, Regardless of the Development of the Factual Record, where it is Undisputed that the State Courts Ignored Padilla and Strickland.

Respondent's principal contention in its opposition brief is that the record is inadequate to decide petitioner's claim under Padilla v. Kentucky, 130 S. Ct. 1473 (2010). As will be discussed below,

that contention is incorrect. Even more to the point, however, respondent's arguments regarding the state of the record are a red herring, because the New York courts made an indisputable *legal* error. Specifically, even though both Padilla and Strickland v. Washington, 466 U.S. 668 (1984) were called to their attention, the state courts neither cited those cases nor applied the standard set forth therein. Instead, the Appellate Division rejected petitioner's claim on the basis that he received "meaningful representation," a standard that appears nowhere in Strickland and significantly does not incorporate the prejudice prong of the Strickland doctrine.

Respondent claims that the "meaningful representation" standard is sound because it is "more generous" than Strickland. See Opp. Brf. at 24-25. In some circumstances, this is no doubt the case, because New York courts may find ineffective assistance even without a showing of prejudice where an attorney's overall representation was poor. However, the New York standard also allows the opposite – i.e., that the state courts may *not* find ineffective assistance, even in the face of prejudicial error, where the attorney's overall representation was adequate.

In other words, "the New York test averages

out the lawyer's performance while Strickland focuses on any serious error and its consequences." Rosario v. Ercole, 617 F.3d 683, 686 (2d Cir. 2010) (Jacobs, C.J., dissenting from denial of rehearing *en banc*); see also id. at 684 (Wesley, J., concurring) ("the state standard could be misapplied to diminish the prejudicial effect of a single error"). The Second Circuit has recognized that, although more generous in many circumstances, the New York test may permit courts to "look past a prejudicial error as long as counsel conducted himself in a way that bespoke of general competency throughout the trial." Rosario v. Ercole, 601 F.3d 118, 126 (2d Cir. 2009).

This is, indeed, the way New York courts often do interpret the "meaningful representation" standard. See, e.g., People v. McClain, 250 A.D.2d 871, 873 (N.Y. App. Div. 1998) (finding that counsel committed errors, but not considering their prejudicial impact because "counsel propounded appropriate motions, presented an adequate opening statement, properly challenged testimony of witnesses and fully participated in the formulation of Supreme Court's charge to the jury"). And the New York Court of Appeals has opined that a single error by counsel may only amount to ineffective assistance if it is "clear-cut and completely dispositive," a far cry from the "reasonable probability" standard imposed

by Strickland. See People v. Borell, 12 N.Y.3d 365, 369 (N.Y. 2009); see also id. at 368 (stating with approval that New York courts "have often tolerated errors by counsel where the overall representation was nonetheless capable of characterization as 'meaningful').

It is thus clear that, rather than considering the substance of petitioner's Padilla claim and determining whether his attorney's inadequate immigration advice caused the prejudice contemplated by Strickland, the state courts "averaged out" his performance and considered only whether his overall representation was "meaningful." This clearly amounted, in practice, to a *less* generous standard than Strickland, even if the state standard might be more protective in other cases.

Consequently, this is an ideal case for "grant, vacate and remand" treatment. Because the state courts indisputably used the wrong legal standard, this Court should remand for reconsideration under the right one. At that point, the state courts will be able to determine for themselves whether the record is adequate or whether further factual development is necessary.

B. Petitioner's Padilla Claim Is Meritorious.

Respondents' brief argument as to the merits of petitioner's Padilla claim only highlights why *certiorari* should be granted in this case. The very issue to be determined (either by this Court or by the state courts on remand) is when, and under what conditions, a "reverse-Padilla" claim can succeed. The fact that there is a bona fide dispute as to whether the instant matter satisfies those conditions makes this an ideal test case.

Respondent's argument is also substantively flawed. In essence, respondent contends that, because petitioner would have been subject to *discretionary* deportation had he taken the plea, (a) his counsel did not act improperly in advising him that he would be deported, and (b) he would not have taken the plea even if fully and correctly advised. See Opp. Brf. at 19-20, 23. But there is a far cry between discretionary and mandatory deportation.

Respondents are correct that, if petitioner had taken the plea, he would have been "deportable" under 8 U.S.C. § 1227(a)(2)(A). However, nearly all resident aliens convicted of crimes would fall into that category. Those who are not aggravated felons – as petitioner would not have been had he taken the

plea – may seek discretionary relief, which is often granted to nonviolent offenders with American-citizen children. Indeed, as a practical matter, deportation proceedings are often *never commenced* against non-aggravated-felons who are sentenced to short county jail terms.

There is thus a qualitative difference between discretionary and mandatory deportation. Had petitioner taken the plea, removal proceedings would likely never have been commenced, and even if they had, he could have obtained counsel and petitioned for discretionary relief. The odds of him actually being deported would have been far less than the certainty he was *told* he would face, and would have figured heavily into any decision to plead or not plead.

Indeed, if respondent's argument is taken to its logical conclusion, there can *never* be a successful Padilla claim by a defendant who rejected a favorable plea. Respondent essentially claims that, because almost any alien convicted of a crime *may* someday be deported, it doesn't matter whether his counsel erroneously tells him that deportation is *certain*, and that the difference between a remote possibility and a virtual certainty is immaterial to a defendant's weighing of an offered plea. Given this

Court's explicit statement that intelligent plea bargaining is one of the purposes of accurate immigration advice, see Padilla, 130 S. Ct. at 1486-87, such an extreme position is untenable.

Moreover, there is yet another reason to believe that petitioner would have taken the plea if correctly advised. He said so at sentencing. And not only that, but the plea would have resulted in a sentence only five percent of the *minimum* he now faces. There is thus ample indication that petitioner suffered both the inadequate representation and prejudice prongs of Strickland as applied in Padilla.[1]

C. The Record Is More Than Sufficient to Review the Questions Presented.

In any event, respondent's contentions as to the inadequacy of the record are misplaced. To begin

---

[1] Respondent also contends that petitioner cannot prove his eligibility for discretionary relief because the record does not show that he was a lawful permanent resident "for five years prior to his crimes." See Opp. Brf. at 22. In fact, both the prosecution and defense sentencing memoranda, which are part of the record, establish petitioner's residence (and ownership of a legitimate business) for the requisite period.

with, the Appellate Division obviously believed that the record was sufficient, as it decided petitioner's claim on the merits.

As respondent acknowledges, this Court may review a claim that was "expressly decided" by the state courts. See Adams v. Robertson, 520 U.S. 83, 86 (1997). In the instant case, the Appellate Division reviewed and rejected petitioner's ineffective assistance claims *in toto*, finding that he received "meaningful representation." See People v. Haque, 70 A.D.3d 967, 968 (N.Y. App. Div. 2009).

Respondent argues that, because petitioner's ineffective assistance claim had several branches and the Second Department did not reject each of them individually, it must not have "expressly decided" his Padilla claim. See Opp. Brf. at 17-18. However, there is no rule either in this Court or in the Appellate Division that requires the court to rule separately on each branch of a claim. It is common for intermediate appellate courts in New York to rule on multi-faceted ineffective assistance claims *in toto* without discussing each individual argument made by the appellant. Indeed, the state courts sometimes lump ineffective assistance claims together with other arguments and simply state that "the defendant's remaining contentions are without

merit." Such rulings are regarded by the courts as encompassing each facet of the claim.[2]

Accordingly, the claim herein was expressly decided by the Appellate Division and is properly before this Court.[3]

---

[2] For instance, in People v. Shih-Wei Su, 213 A.D.2d 502, 503 (N.Y. App. Div. 1995), the Second Department, without specifically mentioning the defendant's ineffective assistance claims, found that his "remaining contentions are either unpreserved for appellate review or without merit." Upon a subsequent appeal from the denial of a post-conviction motion alleging ineffective assistance, the same court held that this claim was procedurally barred because it had been decided on the merits on direct appeal. See People v. Shih-Wei Su, 267 A.D.2d 260 (N.Y. App. Div. 1998).

[3] Respondent's contention that petitioner "still has" an opportunity to bring his Padilla claim before the courts via a motion under Section 440.10 of the New York Criminal Procedure Law, see Opp. Brf. at 14-15, 17, is disingenuous. Although respondent cites this Court's decision in Massaro v. United States, 538 U.S. 500 (2003), it neglects to inform this Court that the New York State judiciary has not adopted Massaro.

Respondent's contentions as to the adequacy of the record also depend upon taking various parts of it in isolation rather than considering it as a whole. For instance, respondent contends that, although petitioner's counsel expressed concern about "the fallout from immigration" in advising Mr. Haque about the potential plea, he did not state what advice he actually gave. This statement, however, must be

---

Instead, New York requires "record-based" ineffective assistance claims to be raised on direct appeal. See, e.g., People v. Ozuna, 27 A.D.3d 339, 339-40 (N.Y. App. Div. 2007). In the instant case, because the grounds for petitioner's Padilla claim do appear in the record, he was required to raise it on direct appeal or else risk a procedural bar. Moreover, because the Appellate Division actually decided the claim, respondent will no doubt argue (although petitioner does not concede) that it is procedurally barred under N.Y. CPL § 440.10(2)(a) in the event that petitioner seeks to raise it in a future CPL § 440.10 motion. Petitioner, in other words, faces precisely the catch-22 that this Court decried in Massaro. Thus, at minimum, if this Court accepts the People's contention that the record is inadequate and that petitioner "still has" the chance to raise his Padilla claim via Section 440.10, it should require respondent to keep its word and waive any procedural bar should petitioner seek such relief.

taken *in combination* with petitioner's own statement at sentencing in which he made clear that he rejected the plea because he was given the impression that he would be subject to mandatory deportation.

Similarly, although respondent contends that the existence of a plea offer is supported only by petitioner's "self-serving statement" at sentencing, see Opp. Brf. at 13, the fact remains that the prosecuting attorney never contradicted this statement. Surely, had petitioner sought leniency based on a lie, the prosecutor would have set the record straight. The absence of any contrary indication on the record is sufficient for this Court to find that the plea offer was made.[4]

At any rate, this Court can sidestep any issues

---

[4] Respondent's attempt to parse certain other statements on the record referring to the "possibility," "risk" or "likelihood" of deportation, see Opp. Brf. at 11-12, fares no better, because it ignores the fact that, at the time these statements were made, the plea offer had already been made and rejected. It is entirely natural for people to talk about a contingent event in terms of "possibility" even though, had the contingency occurred, the consequences would have been certain.

relating to the adequacy of the record by simply granting certiorari, vacating the Appellate Division's decision and remanding for reconsideration in light of Padilla. The state courts could then determine for themselves whether to decide the claim on the main record, remand for further fact-finding,[5] or relegate petitioner to a Section 440.10 post-conviction motion.

CONCLUSION

In light of the foregoing, this Court should grant *certiorari* on all issues raised in this Petition. Upon granting *certiorari*, this Court should review and vacate petitioner's conviction or, in the alternative, remand for reconsideration by the Appellate Division in light of Padilla.

Dated: New York, NY
November 29, 2010

JONATHAN I. EDELSTEIN

---

[5] Contrary to respondents' contention, see Opp. Brf. at 26-27, petitioner does not claim that the Appellate Division was "constitutionally obligated" to conduct fact-finding with respect to his Padilla claim, only that it *has the power* to do so if it wishes.